

**NOT INTENDED FOR PUBLICATION
UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF GEORGIA
NEWNAN DIVISION**

IN THE MATTER OF:	:	CASE NUMBERS
	:	
JANE D. DAYVOLT,	:	BANKRUPTCY CASE
	:	NO. 01-13051-WHD
Debtor.	:	
_____	:	
	:	
C & W ACQUISITION ASSET, LLC,	:	
	:	
Plaintiff,	:	ADVERSARY PROCEEDING
	:	NO. 02-1021
v.	:	
	:	
JANE D. DAYVOLT,	:	IN PROCEEDINGS UNDER
	:	CHAPTER 7 OF THE
Defendant.	:	BANKRUPTCY CODE

ORDER

Before the Court is a Motion to Enforce Settlement Agreement, filed by the plaintiff, C & W Acquisition Asset, LLC (hereinafter the "Plaintiff") in the above-captioned adversary proceeding. The Motion arises in connection with an adversary proceeding, in which the Plaintiff seeks the denial of the discharge of Jane D. Dayvolt (hereinafter the "Debtor"). This matter constitutes a core proceeding that falls within the Court's subject matter jurisdiction. *See* 28 U.S.C. §§ 157(b)(2)(J); 1334.

BACKGROUND AND PROCEDURAL HISTORY

The Debtor filed a voluntary petition under Chapter 7 of the Bankruptcy Code on November 19, 2001. On December 5, 2002, the Plaintiff filed a complaint objecting to the Debtor's discharge pursuant to § 727(a)(4) and (5). The complaint did not plead a cause of action under § 523(a). On December 26, 2002, the Debtor filed an answer to the complaint. The Court held a pre-trial conference on October 10, 2003, at which time the parties agreed that the matter would proceed to trial. A trial date of January 20, 2004 was set and noticed. However, prior to the trial date, the parties informed the Court that a settlement had been reached. The parties entered a stipulation and order of settlement, which was signed by attorneys for both the Debtor and the Plaintiff and presented to the Court for signature at some time in August 2004.

Pursuant to the proposed stipulation and order, the Debtor agreed to pay the Plaintiff \$15,000 in equal installments over ten months. The stipulation also provided that the Plaintiff would retain its security interest in certain shares of stock until the Debtor paid over the funds, and, upon any default, the Plaintiff would be entitled to pursue the stock in accordance with state law. Additionally, the Debtor agreed that the resulting obligation to pay \$15,000 would be considered non-dischargeable pursuant § 727(a)(4).

Upon receipt of the proposed stipulation, the Court's law clerk contacted the parties and informed them that the entry of the proposed order would be inappropriate. The law clerk explained to the parties that the Court could not approve the settlement of a discharge objection that would be conditioned upon the payment of funds by the Debtor to the Plaintiff and a finding by the Court that the resulting obligation is nondischargeable. *See In re*

Parker, 2003 WL 21703528 at * 1 (Bankr. N.D. Ga. July 18, 2003) (Bonapfel, J.)(citing *In re Grosse*, 1997 WL 668059 at *3 (Bankr. E.D. Pa. 1997)); *In re Vickers*, 176 B.R. 287 (Bankr. N.D. Ga. 1990) (Massey, J.) ("Either the discharges ought to be granted or they ought to be denied. Nothing in the Bankruptcy Code authorizes a trustee to seek funds from a debtor or to release a non-debtor entity as a price for giving up on a discharge complaint."). During this conversation, the parties discussed the possibility that the Debtor would be willing to reaffirm her debt to the Plaintiff, a secured creditor, after which, the Plaintiff would be willing to dismiss the adversary proceeding. The Court's law clerk expressed her opinion that the Plaintiff could voluntarily dismiss the adversary proceeding, following the entry of a reaffirmation agreement by the Debtor.¹

On February 7, 2005, the Plaintiff filed the instant motion, in which it alleges that Plaintiff's counsel prepared a reaffirmation agreement and submitted it to Debtor's counsel for the Debtor's signature, but that Debtor's counsel later informed Plaintiff's counsel that the Debtor had changed her mind and no longer wished to enter a reaffirmation agreement because she could not afford the monthly payments. In the Motion, the Plaintiff moves the Court to enforce the settlement agreement.

Although the Plaintiff cites Georgia law for the proposition that a trial court is obligated to enforce a settlement if: 1) it is clear that the attorney for the party opposing the

¹ Apparently, the parties intended to wait for the sixty-day period, during which the Debtor could have rescinded the reaffirmation agreement, to expire, at which point, the Plaintiff would have dismissed the complaint. However, the parties must not have considered the fact that, pursuant to § 524(c)(4), the Debtor would have been entitled to rescind the agreement up until the entry of her discharge. The Debtor's discharge could not have been entered by the Court until after the Plaintiff dismissed its complaint.

settlement had authority to bind the party; 2) the court was informed that a settlement had been reached; and 3) an agreement incorporating the terms of the settlement agreement has been prepared. *See Stookey v. Stookey*, 274 Ga. 472 (2001). The Court does not dispute that these elements have been satisfied in this case. However, the Plaintiff fails to consider the fact that the original settlement to which the parties agreed could not be approved by the Court, as it violated public policy, and that the second method by which the parties tried to resolve this case was, in substance, the same settlement, and, therefore, would also have violated public policy. Assuming the Court would have permitted the parties to proceed as they had planned, the Court cannot now force the Debtor to enter a reaffirmation agreement.

Section 524(c) provides that an agreement by a debtor to waive the discharge of a debt is valid only under certain circumstances. *See* 11 U.S.C. § 524(c). First, a reaffirmation agreement is not valid unless the debtor's attorney files an affidavit stating that the debtor made the agreement *voluntarily* and that the terms of the agreement will not pose an undue hardship upon the debtor. *Id.* § 524(c)(3). Second, a reaffirmation agreement is not valid if the debtor rescinds the agreement within sixty days of the filing of the agreement, or the entry of the debtor's discharge, whichever occurs later. *Id.* § 524(c)(4). It is clear to the Court that, even if the Debtor had signed the reaffirmation agreement, she would have had an opportunity to change her mind and rescind the agreement. Accordingly, it makes no sense for the Court to force her to sign the agreement at this time. Additionally, if the Court were to force the Debtor to sign the reaffirmation agreement, the agreement would not be valid, as it would be impossible for any court to make a finding that the Debtor

voluntarily entered the agreement. In any event, this Court recognizes that the intent of a reaffirmation agreement is to allow the Debtor to voluntarily reaffirm debts only when doing so would provide the Debtor with a benefit that outweighs the burden of the reaffirmed debt. From the facts before the Court, it appears that the Debtor would be especially burdened by the reaffirmation of this debt. The purpose of § 524(c) would not be achieved, nor would its requirements be respected, if the Court forced the Debtor to comply with the terms of this settlement.

It is unfortunate that the Plaintiff finds itself without a remedy to enforce the settlement that it believed it had reached with the Debtor. That being said, the Plaintiff could have filed a complaint alleging that its debt is nondischargeable pursuant to § 523(a). The Plaintiff chose not to do so, possibly because the facts of this case did not warrant it, and the time to do so has expired. At this point, the Plaintiff, as a secured creditor, retains the right to pursue its collateral in satisfaction of the debt. Additionally, the Plaintiff may still proceed to trial on its claim that the Debtor's discharge should be denied.

CONCLUSION

For the reasons stated above, the Plaintiff's Motion to Enforce Settlement is hereby **DENIED**. The Plaintiff shall have thirty (30) days in which to file a voluntary motion to dismiss pursuant to Rule 7041 of the Federal Rules of Bankruptcy Procedure, or to request a trial date. If the Plaintiff takes no action within this time, the Plaintiff's complaint will be dismissed without further notice or hearing.

IT IS SO ORDERED.

At Newnan, Georgia, this _____ day of March, 2005.

W. HOMER DRAKE, JR.
UNITED STATES BANKRUPTCY JUDGE